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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 09/557,234
Filing Date: April 24, 2000
Appellant(s): O'DONNELL, PATRICK J.

Glen L. Nutall
For Appellant

EXAMINER'S ANSWER

The previous Examiner's Answer of 21 June 2007 has been VACATED and replaced with this Examiner's Answer, which is in response to an Appeal Center Return of 04 September 2007 regarding a missing explanation of the grounds of rejection. This Examiner's Answer corrects the indicated omission and is in response to the appeal brief filed 05 February 2006 appealing from the Office action mailed 24 September 2004.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief, Patrick J. O'Donnell.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct. The summary of claimed subject matter for independent claim 19 begins in section D and for independent claim 36 begins in section E.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

Des. 425,603	Guo	05-2000
3,737,105	Arnold et al	06-1973

Brochure page from Kimbrew-Walter Roses re "Jet-All" sprayer, Route 2, Box 172, Grand Saline, Texas 75140, (903) 829-2968.

(9) Grounds of Rejection

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 36-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Des. 425,603 to Guo in view of Kimbrew-Walter Roses "Jet–All" sprayer.

Regarding Claim 36, Guo teaches spraying apparatuses for horticulture application providing a hand held spraying apparatus having a handle, an elongated body portion, and a nozzle portion at a distal end of the body portion, the nozzle portion having a longitudinal axis and being adapted to direct water flow outwardly around the circumference of the nozzle axis, the apparatus configured so that moving the handle correspondingly moves the nozzle portion; inherently providing a source of water under pressure; inherently placing the spraying apparatus into communication with the source of water under pressure (Guo Fig. 1).

Guo is silent on a method for removing insects from and cleaning a plant having leaves. However, "Jet-All" teaches using a spraying apparatus by positioning the nozzle adjacent an underside of a plant leaf so that a portion of the water directed by the nozzle impacts the leaf underside and the longitudinal axis of the nozzle is generally horizontally disposed at a first elevation and advancing and retracting the nozzle generally horizontally so that a flow of water imparts the leaf underside along its length ("Jet-All" brochure). It would have been obvious to one of ordinary skill in the art at the time of the invention to apply the apparatus taught by Guo in a method of insect removal taught by "Jet-All" since the modification is merely the application of alternate equivalent spraying apparatuses selected for different cost and ergonomic advantages. The spraying apparatus contains all of the structural limitations of applicant's claim language and therefore has the capability of performing the method steps presented by "Jet-All". The intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Guo as modified inherently teaches rotating the apparatus at least about 90 degrees so that the longitudinal axis of the nozzle is moved to a second elevation but remains generally horizontally disposed during rotation and advancing and retracting the nozzle generally horizontally at the second elevation to efficiently and effectively treat all size plants.

Regarding Claim 37, Guo as modified by "Jet-All" inherently teaches the step of holding the elongated body at a generally horizontal attitude and advancing and retracting the nozzle through the application of the apparatus to a variety of different size plants.

Regarding Claim 38, Guo as modified by "Jet-All" teaches that elongated body is at least 18 inches long (See "Jet-All" flier).

Claims 19-28, 33-35, 39, and 40 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 3,737,105 to Arnold in view of U.S. Patent Des. 425,603 to Guo and Kimbrew-Walter Roses "Jet–All" sprayer.

Regarding Claims 19, 20, 25, and 34, Arnold teaches a nozzle spraying apparatus having a longitudinal axis and adapted to direct a generally continuous water flow in a direction outwardly from the axis around the substantially entire circumference of the nozzle axis (Arnold Fig. 1 #45 and 46). Arnold is silent on the handle. However, Guo teaches spraying apparatuses providing a hand held spraying apparatus having a handle, an elongated body portion, and a nozzle portion at a distal end of the body portion, the nozzle portion having a longitudinal axis and being adapted to direct water flow outwardly around the circumference of the nozzle axis, the apparatus configured so that moving the handle correspondingly moves the nozzle portion; inherently providing a source of water under pressure; inherently placing the spraying apparatus into communication with the source of water under pressure (Guo Fig. 1). It would have been obvious to one of ordinary skill in the art to modify the teachings of Arnold with the teachings of Guo to provide a handle for the ergonomic advantage illustrate by Guo.

Since it is old and notoriously well-known to place extensions/handles on nozzles to reach higher elevations or into narrow areas.

Arnold as modified by Guo is silent on a method for removing insects from and cleaning a plant having leaves. However, "Jet-All" teaches using a spraying apparatus by positioning the nozzle adjacent an underside of a plant leaf so that a portion of the water directed by the nozzle impacts the leaf underside and the longitudinal axis of the nozzle is generally horizontally disposed at a first elevation and advancing and retracting the nozzle generally horizontally so that a flow of water imparts the leaf underside along its length ("Jet-All" brochure). It would have been obvious to one of ordinary skill in the art at the time of the invention to apply the apparatus taught by Arnold in a method of insect removal taught by "Jet-All" since the modification is merely the application of a known alternate equivalent spraying apparatuses selected for different cost and ergonomic advantages. In addition, the spraying apparatus contains all of the structural limitations of applicant's claim language and therefore has the capability of performing the method steps presented by "Jet-All".

Arnold as modified by "Jet-All" inherently teaches rotating the apparatus at least about 90 degrees so that the longitudinal axis of the nozzle is moved to a second elevation but remains generally horizontally disposed during rotation and advancing and retracting the nozzle generally horizontally at the second elevation to efficiently and effectively treat all size plants.

Regarding Claim 21, Arnold as modified teaches the nozzle being adapted to direct flow of water in a substantially vertical plane. (Guo Fig. 1).

Regarding Claim 22, Arnold as modified by "Jet-All" teaches that at least one of the substantially vertical planes is substantially perpendicular to the nozzle portion and inherently comprising the step of holding the elongated body in a substantially horizontal attitude. ("Jet-All"). It would have been obvious to one of ordinary skill in the art to modify the teachings of Guo with the spray direction of "Jet-All" for an increase in coverage area.

Regarding Claim 23 and 33, Arnold as modified by "Jet-All" teaches that the handle includes a bend point and inherently teaches the step of adjusting the elevation of the body portion by rotating the handle about a proximal end of the handle. (Guo Fig. 1).

Regarding Claim 24, Arnold as modified by "Jet-All" inherently discloses advancing and retracting the apparatus into and out of the plant at a plurality of locations, so that water directed by the nozzle simultaneously impacts the top side of a first plant leaf along at least a portion of its length and the underside of a second plant leaf along at least a portion of its length.

Regarding Claim 35, Arnold as modified teaches the broadly presented claim language that the elongated body and the nozzle portion being **substantially** straight and having **substantially** the same longitudinal axis. (Guo Fig. 1).

Regarding Claim 39, Arnold as modified teaches the handle is bent about 30-60 degrees at the bend point (Guo Fig. 1).

Regarding Claim 40, Arnold as modified by "Jet-All" inherently teaches rotating the apparatus about 90 degrees while keeping the longitudinal axis of the nozzle

generally horizontally disposed during rotation and advancing and retracting the generally horizontally into and out of the plant a plurality of times while rotating the apparatus.

Regarding Claim 26, Arnold as modified discloses that the nozzle is adapted to create two or more substantially planar and contiguous walls of water around the circumference of the nozzle, the walls of water being spaced apart from each other (Arnold #45 and 46).

Regarding Claims 27 and 28, Arnold as modified by "Jet-All" inherently discloses advancing and retracting the nozzle between leaves of the plant at a plurality of locations, so that the portions of the wall of water simultaneously impact undersides of leaves generally above the nozzle, top sides of leaves generally below the nozzle, and any matter that may be between the leaves of the plant.

(10) Response to Argument

Examiner maintains that Guo teaches each and every structural limitation claimed by applicant in claims 36-38 of the pending application. Independent claim 36 merely states "the nozzle configured to direct a flow of water outwardly generally around a longitudinal axis of the nozzle portion". Guo Figure 6 is a view of the face of the nozzle, which contains a series of apertures in circular orbits *surrounding* the center of the face of the nozzle. The longitudinal axis passes through the center of the face of the nozzle (which applicant has identified as element #42 in Fig. 1 of the pending application) and thus the apertures of Guo that emit the spray are directing the water in a parallel direction of the longitudinal axis and thus directed the water *outwardly*

generally around the longitudinal axis. Applicant has not gone into any detail about the spray being emitted around the entire circumference of the nozzle as alternately claimed in independent claim 19. Thus, examiner maintains that Guo alone teaches all of the structural limitations as presented in independent claim 36.

The Guo reference was cited to teach the known structure of the spray apparatus. Guo teaches it is known to provide a hand held spraying apparatus with a handle, an elongated body, the nozzle fixedly connected to the handle and being configured to move with the handle.

The "Jet-All" reference was cited to teach that it is notoriously well-known to take a handle held spraying apparatus and use it to remove insects from vegetation by inherently advancing and retracting the nozzle in a generally horizontal direction. The nozzle would inherently be advanced and retracted in order to insert the nozzle into the bush as illustrated in the "Jet-All" brochure. Furthermore, examiner maintains that it is obvious that during routine spraying in order to inherently cover the entire bush applicant's claimed orientation would be achieved. Applicant's claim language does not limit the orientation to just that orientation. It is desired to have full coverage and thus one of ordinary skill in the art would have to position the apparatus in a variety of positions to meet the method steps and would have to rotate it in multitude of directions. At some point during the rotation to thoroughly cover the vegetation it would be obvious to achieve the claimed orientation. In other words, it is desirable to have complete application coverage of the vegetation for effective results and this complete coverage is achieved by an obvious multitude of orientations to treat the vegetation. By achieving

complete coverage one of ordinary skill would have inherently achieved the orientation presented by applicant at some point during the application. Applicant has not limited the method to just the steps outlined in the claim, i.e. applicant has **not** claimed "*only* rotating the apparatus to at least about 90 degrees so that the longitudinal axis of the nozzle is moved to a second elevation but remains generally horizontally disposed during rotation". Thus one of ordinary skill in the art is free to orient the wand in multiple orientations.

By rotating the wand in different orientations inherently increases the coverage area because the spray is reaching parts of the vegetation that wouldn't have been reached if it remained in merely one orientation. It is obvious to orient a device in a desired manner to fit the space constraints of the situation. Orientation of the wand would depend on the size and shape of the vegetation. For example, a tree/bush that is tall, possibly even taller then the user would require an orientation to reach the higher elevations. Also, if the tree/bush is very wide it would be obvious for the user to have to advance and retract the wand to cover the full width of the bush. Maybe the tree/bush is located close to a fence and only allows access from one side of the bush. It would be obvious to one of ordinary skill in the art to advance and retract and re-orient to achieve full coverage and in a manner that prevents spray back as taught by "Jet-All". Therefore, "Jet-All" obviously teaches all the method steps presented by applicant.

Examiner maintains that it would have been obvious to one of ordinary skill in the art to apply the method steps of "Jet-All" to the spray apparatus of Guo since this application is merely selected a known application for use. Merely utilizing the spray

apparatus of Guo in the manner taught by "Jet-All" is just merely putting the apparatus to use to solve a known problem. One of ordinary skill in the art would be motivated to use the apparatus of Guo in the manner taught by "Jet-All" to provide consumers another reason/application to use the sprayer and thus to increase sales of the sprayer. The apparatus of Guo is merely a design and the teachings of "Jet-All" are merely a method. Using the design apparatus in the method of vegetation applications is merely an efficient use of the apparatus.

The examiner maintains that it would have been obvious to one of ordinary skill in the art to modify the teachings of Arnold with the teachings of Guo. The Arnold references was cited to teach the known structural features of the nozzle as claimed by applicant in independent claim 19. Arnold teaches that it is notoriously well-known to have a nozzle that directs water flow outwardly around the circumference of the nozzle axis. Arnold teaches that the nozzle is attached to a pipe (Arnold #14). Examiner maintains that it would have been obvious to one of ordinary skill in the art to modify the nozzle of Arnold with the hand held features of Guo at the time of the invention for the ergonomic advantage of being able to carry the nozzle by the handle, for the advantage to reach different depths or heights with the handle, or for the advantage to have more control directing the spray to a specific area via the location of the handle. Merely substituting the pipe of Arnold with the handle of Guo is an obvious modification. Examiner disagrees with applicant that Arnold and Guo teach away from one another. Arnold teaches that the feature of the nozzle is adapted to be used in any situation that requires a radial spray (Arnold Col. 1 line 25-26 and Col.2 line 50-51). Furthermore, it

would have been obvious to one of ordinary skill in the art to further modify the teachings of Arnold with the teachings of "Jet-All" as set forth in the preceding paragraphs.

Examiner maintains that applicant has not successfully established sufficient support that applicant's invention has satisfied a long-felt need not solved by others. Regarding applicants arguments establishing a long felt need, the examiner maintains that the supplied declarations are not persuasive and fail to establish sufficient evidence of a long-felt need. The declaration must establish a baseline comparison. For instance, the declaration should compare the effectiveness of applicant's product over that of the "Jet-All" device. If no comparison is established then it is unclear what the person giving the declaration is familiar with, e.g. are they comparing it to a simple hose or a random irrigation system. There is not enough evidence of what is being declared is true. Again, the declaration must present arguments of a more effective design. Thus more evidence is necessary to prove that a long-felt need was not satisfied by another before the invention by applicant. Regarding the surveys submitted by applicant, it is not clear to the examiner whether the users in the survey are associated with the applicant or if they are an anonymous third party. The Garden Club needs to provide a statement that they are not affiliated with the applicant and they were not paid or did not receive compensation from applicant to conduct the test of the product.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Andrea M. Valenti
Primary Patent Examiner
Art Unit 3643

13 September 2007

Conferees:

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